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No. 90-435

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In the Supreme Court of the United States

OCTOBER TERM, 1990

EDWIN W. HAMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the border search of petitioner's vessel violated the Fourth Amendment.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 24-25) is unreported, but the judgment is noted at 907 F.2d 1142 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1990. The petition for a writ of certiorari was filed on September 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of importing marijuana, in violation of 21 U.S.C. 952(a), and possessing marijuana with intent to distribute

it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 66 months' imprisonment, a $12,500 fine, and a five-year term of supervised release. The court of appeals affirmed. Pet. App. 24-25.

1. In November 1988, the vessel Y RENT, a 44-foot sailboat, traveled from Jamaica to Florida via Mexico. En route to Florida, the Y RENT encountered severe weather and experienced engine failure; petitioner, the boat's owner, asked the Auxiliary Coast Guard for help. On the afternoon of November 11, the Coast Guard towed the vessel to the Gasparilla Marina near Punta Gorda, Florida. Pet. C.A. Br. 18-19. About two hours later, agents from the United States Coast Guard, the United States Customs Service, and the Charlotte County Sheriff's Department asked permission to board the boat. Gov't C.A. Br. 1. Agent Ron Bellomy of the Sheriff's Department had observed the Y RENT to be listing in the marina as if something heavy was stowed in the stern, and he had noticed that the boat had an unusual tiller. *Id.* at 1, 2. Petitioner permitted the agents to board the vessel. The agents checked documentation and safety equipment, and they asked petitioner and his two passengers where they had been. Although all three denied having been to Mexico, petitioner was unable to produce documentation showing his last port of call. *Id.* at 1-2, 13.

The agents conducted an "admeasurement," a computation of the boat's accountable spaces, which revealed that the Y RENT contained some unaccounted for space at its stern. Gov't C.A. Br. 2. Their suspicions aroused, the agents began to inspect the Y RENT, looking in compartments, in luggage, and under cushions. With the assistance of a drug detection dog, they also looked behind some paneling and under some fixtures, and they unpacked the sails. Because the agents did not have in Punta Gorda the equipment they needed to examine the unaccountable

space, they decided to move the boat to the Fort Myers Coast Guard Station where a more thorough examination could take place the next day. The agents halted their search at approximately midnight on November 11. *Id.* at 2-3.

In the early morning of November 12, scuba divers examined the hull of the Y RENT. Shortly thereafter, the vessel was towed to the Fort Myers Coast Guard Station, a four-hour trip, where a drug detection dog again sniffed the vessel. The agents then began to search for the unaccountable space revealed by the admeasurement, by drilling a hole in the Y RENT's stern. At 4:30 p.m. they discovered a secret compartment containing more than 100 kilograms of marijuana wrapped in brown cellophane. Gov't C.A. Br. 3.

2. Petitioner filed a pretrial motion to suppress the evidence seized from the Y RENT. The district court denied the motion, stating that a warrant was not needed because the vessel was searched after coming to port from outside the country. Petitioner was subsequently convicted, and the court of appeals affirmed in an unpublished judgment order. Pet. App. 23-24.

ARGUMENT

Petitioner contends (Pet. 9-13) that the search of his vessel violated the Fourth Amendment.

As the district court found (and petitioner does not dispute), the search of the Y RENT took place at the international border, in waters immediately accessible to the open ocean. This Court has stated that at the border "the Fourth Amendment balance of interests leans heavily to the Government," *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 544 (1985), and that "the Fourth Amendment's balance of reasonableness is qualitatively

different at the international border than in the interior." *Id.* at 538. Thus, *Montoya de Hernandez* concluded that "detention * * * at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents * * * reasonably suspect that the traveller is smuggling contraband * * *." *Id.* at 541.[1]

The agents had strong grounds for suspicion that the Y RENT was carrying contraband. Under *Montoya de Hernandez,* their reasonable suspicion of drug smuggling justified the detention and further search of the vessel for the period necessary to conduct a thorough search. See *United States* v. *Puig,* 810 F.2d 1085, 1086 (11th Cir. 1987). The vessel was listing visibly in the marina, which suggested that it was heavily loaded in the rear. See *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 885 (1975) (appearance of heavy load in vehicle "may justify [reasonable] suspicion" of contraband); *United States* v. *Sharpe,* 470 U.S. 675, 683 n.3 (1985) ("heavily loaded" appearance of truck contributed to justification for investigatory stop). Further, admeasurement revealed that the vessel had an unaccountable space at its stern that could be used to hide drugs. The agents thus believed the boat was carrying something heavy near the stern that was probably stored in a hidden space. Cf. *Sharpe, supra* (covered windows of heavily loaded truck contributed to reasonable suspicion). Petitioner's inability to document his last port of call reinforced the agents' suspicions that he was trying to conceal the vessel's itinerary and cargo.

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[1] Petitioner mistakenly relies (Pet. 10-14) on *United States* v. *Roy,* 869 F.2d 1427 (11th Cir.), cert. denied, 110 S. Ct. 35 (1989), and *United States* v. *Freeman,* 579 F.2d 942 (5th Cir. 1978), to argue that Customs agents must have probable cause to search a vessel at the border. *Roy* involved a search on the high seas, not a border search. In *Freeman,* the court held that Customs agents had probable cause to search and therefore did not reach the question whether that level of suspicion was required.

Contrary to petitioner's contention (Pet. 19-20), the drilling of holes in the boat did not render the search unreasonable. The drugs eventually recovered from the Y RENT were stashed in a secret and sealed compartment. There was no way to gain access to the compartment other than by damaging the vessel, a course of action that has been held reasonable under circumstances such as the ones in this case. See *United States* v. *Puig*, 810 F.2d at 1086-1087 (drilled holes); *United States* v. *Moreno*, 778 F.2d 719, 721 (11th Cir. 1985) (drilled holes in fuel tanks); *United States* v. *Lopez*, 761 F.2d 632, 634 (11th Cir. 1985) (use of ax); *United States* v. *Sarda-Villa*, 760 F.2d 1232, 1235, 1239 (11th Cir. 1985) (use of ax and crowbar); *United States* v. *Andreu*, 715 F.2d 1497, 1499 (11th Cir. 1983) (use of electric saw). Were the rule otherwise, a smuggler could ensure his success by sealing hidden spaces "so that some damage to the vessel would be inevitable if officers attempted to conduct a full-scale search." *Id.* at 1501 n.13. Similarly, despite petitioner's objections (Pet. 20), the use of narcotics detection dogs was a reasonable means of seeking to discover the concealed contraband.[2]

Nor did the length of the search make it unreasonable. A search for hidden contraband in concealed compartments in a boat is inherently time-consuming; the agents could not have completed their search in a short time and without the special equipment needed to gain access to the secret compartment in the stern. In light of the need to tow the vessel to the nearest Coast Guard Station and resume the search there, the border search in this case was handled

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[2] The use of scuba divers to examine the exterior of the vessel did not implicate petitioner's privacy interests at all; their activities did not even constitute a "search" within the meaning of the Fourth Amendment. See *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. 583, 591 (1974) (examination of car's exterior not Fourth Amendment search).

as expeditiously as the circumstances allowed. This Court has "consistently rejected hard-and-fast time limits" on detentions, *Montoya de Hernandez*, 473 U.S. at 543 (16-hour detention of suspected drug smuggler reasonable), but instead has allowed authorities to "graduate their response to the demands of [the] particular situation." *Id.* at 542, quoting *United States* v. *Place*, 462 U.S. 696, 709 n.10 (1983). The situation here demanded more than just a few hours, and under the principles of *Montoya de Hernandez* the government's response was entirely reasonable.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1990

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[3] As in *Montoya de Hernandez*, the border search rationale justified not only the detention of the vessel, but also the detention of petitioner and his crew. Moreover, petitioner and the crew were not detained under conditions that rendered their detention unreasonable. The agents allowed them to stay at a local hotel during the search at the Fort Myers Coast Guard Station.

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